

facilities to \$100,000 and asked him to pay off his debts in excess of \$100,000. Subsequently the defendant went with a letter of guarantee to the plaintiffs' office and there signed it. Those are my findings of facts as to the surrounding circumstances and, to my mind, they are sufficiently borne out by the evidence.

It has been contended on behalf of the defendant that he is not liable because the conditions attached to the guarantee were not complied with. It has been suggested that the guarantee is void *ab initio* because the credit balance (which in effect meant the debit balance) of Yang Pin Joo on the date of the guarantee was \$129,518.40 in contravention of condition (a) of the guarantee. I do not agree. It is clear from the evidence in what manner the language of the guarantee was related to the existing facts, namely, that the defendant's guarantee was to extend up to \$100,000 irrespective of Yang Pin Joo's monthly debit balance. Condition (a) of the guarantee, therefore, meant nothing more than that the defendant's liability under the guarantee was limited to \$100,000, which is the amount for which he has been sued.

It has been further contended on behalf of the defendant that conditions (b) and (c) of the guarantee have not been complied with by the plaintiffs. The principle relied upon here is that, if a party agrees to become surety in consideration of something to be done by the creditor, and the creditor omits to do what was agreed to be done by him, the surety is discharged. To my mind, this rule has no application here. Clause (b) speaks of "settlement of all vehicles sold by Yang Pin Joo within 75 days after purchase by him." This merely states what was required of the principal debtor and not the creditors. All that the creditors could do was to keep on pressing their principal debtor for payment, which they did from time to time. The only other alternative for them was to sue, which they ultimately did, after calling upon the defendant to pay under the terms of his guarantee.

It has been argued that clause (c) cast a duty on the plaintiffs to insist on Yang Pin Joo selling the cars on hire purchase because it was on that basis that the defendant gave his guarantee. In my opinion, clause (c) admits of no such construction. In any event, I do not see how the plaintiffs could have taken any action against the hirers of vehicles from Yang Pin Joo as they would not be a party to any such hiring. I also fail to see how the plaintiffs could have taken over within 24 hours all the assets of Yang Pin Joo without a court action. All that the plaintiffs could do was to give Yang Pin Joo credit for whatever they received from him. Some items in respect of which they allowed such

A credit are mentioned in the plaintiffs' letter dated 28th November, 1964 addressed to the defendant. There is also evidence that after obtaining judgment against Yang Pin Joo the plaintiffs took steps to recover from him whatever they could and were then obliged to take bankruptcy proceedings.

B It is clear from the evidence that there was never at any time any question of a new account being opened between Yang Pin Joo and the plaintiffs. His old account was to continue its currency and in fact it was so continued. No separate arrangement was made for the settlement of the old debt. The intention of the parties was that the defendant was to guarantee a continuing account. It is to be observed that the letter of guarantee was headed "Guarantee for credit facilities granted to Mr. Yang Pin Joo."

D The facts of this case and the circumstances under which the letter of guarantee was given are not very different from those in the case of *Oriental Bank of Malaya Ltd. v. N. Subramaniam*,⁽⁵⁾ that being a case of a guarantee in respect of a bank overdraft and this being a case of a guarantee in respect of an existing debit balance of a running account on account of goods supplied.

E For the reasons I have stated, the defendant is clearly liable to pay the plaintiffs the amount mentioned in the guarantee furnished by him. There will therefore be judgment for the plaintiffs for \$100,000 with interest thereon as prayed and costs.

Judgment for the plaintiffs.

Solicitors: V. K. Palasuntharam; Lovelace & Hastings.

MAHINDER SINGH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Pike C.J. (Borneo) and Ong Hock Thye F.J.) October 3, 1966]

[K.L. — Federal Court Criminal Appeal No. X22 of 1965]

H *Penal Code, s. 326 — Voluntarily causing grievous hurt — Conviction by trial judge — Contradictions in evidence of complainant — Conviction set aside.*

I The appellant had been convicted on a charge of voluntarily causing grievous hurt with a spear. The trial judge considered that the evidence of the complainant as regards his ability to identify the assailant was completely unshaken and he found the appellant guilty. In cross-examination the complainant had given contradictory answers as to the identity of the assailant and the weapon used.

Held: the learned trial judge should have taken into consideration the answers of the complainant elicited in cross-examination and in the circumstances of the case and in view of the contradictions in the evidence of the complainant the conviction must be set aside.

FEDERAL COURT.

V. Jayaratnam for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye F.J.: The appellant was convicted in the High Court at Ipoh on a charge of voluntarily causing grievous hurt to one Mohan Singh with a spear, in contravention of section 326 of the Penal Code, and was sentenced to four years' imprisonment.

We allowed his appeal and set aside the conviction on grounds which would be stated in detail later. We now proceed to do so.

Mohan Singh, the injured person, was a bullock carter, 23 years old, who lived in a small kampong on the Tanjong Rambutan Road, about half-a-mile from Chemur Town. In the late afternoon of May 3, 1965 he had spent some time in a toddy-shop, and then a coffee-shop, before going home at about 7 p.m. Having reached home he set out again for Chemur to buy himself some "beedi" to smoke. Passing the house of the appellant in the dark he was stabbed with some weapon, of the nature of a spear or javelin, which entered one side of the lower chest and penetrated to the other. On receiving the wound he said he turned round and saw the appellant standing beside him and the appellant withdrew the object which had penetrated his body. "It was a very long object," so long that he could see it come out on the side opposite to the point of entry. "After withdrawing the object, the accused went in the direction of his house," which was about a chain away. His father and two young Punjabi brothers, Teja Singh and Pretap Singh, who lived close by, responded to his cries for help and his evidence, which they confirmed, was that he identified to them the appellant by name as his assailant.

On the question of identification the learned trial judge expressed himself as follows:

"Having regard to all the evidence adduced on behalf of the prosecution it appeared clear to me that the prosecution's case rested mainly on the evidence of the complainant himself. It is true that several witnesses were called but their evidence established nothing more than that the complainant was found injured on the road on the night in question and that when the witnesses came to his assistance he mentioned to one of them the name of his assailant. So far as the identification of the assailant was an essential matter to be proved by the prosecution, it can fairly be stated here that the complainant's evidence had not been corroborated in material particulars."

These directions are impeccable and it is undoubtedly true to say that the conviction must stand or fall according as the evidence of the complainant was believed or not. Because the judge considered "his evidence as regards his ability to identify his assailant was completely unshaken" he found the appellant guilty.

A With respect, we think that the judge had taken too narrow a view. It was not sufficient merely that the complainant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the court to examine also the grounds of his belief before regarding the question as closed. We have therefore, taken into consideration the complainant's answers elicited in cross-examination, which were undoubtedly material but which the judge had failed to take into account.

B
C Now, the complainant had stated categorically that the appellant pulled out the weapon from his body, that it was a long object, and that having done so the appellant went away in the direction of his house. Indeed the complainant went further when he asserted: "Yes, I saw him inflict the injury here." Thus, in no uncertain terms he had stated, in his evidence-in-chief, that he saw the attack with his own eyes.

D But was he telling the plain truth? We have no hesitation in holding that he, in fact, never set eyes at all on the weapon. From his own mouth there was this denial: "When I say the object was long I mean that I saw I was injured from left to right side and I assumed that the object was long. I did not actually see the object." Had he in truth seen the appellant pull it out he could not have failed to see the weapon and see it clearly too. Going a step further, what did the appellant do with the weapon after recovering it? The complainant said nothing, yet it was of a size which could not have failed to catch and hold the eye and attention of the beholder. Did the appellant take it away? If so, he must have been seen carrying the weapon which could not be hidden on his person or under his clothes. If he dropped it, why was it never found at or near the scene? Here is the real explanation given by the complainant: "When I said that accused withdrew the object I mean that the object was no longer in my body. I concluded that it was the accused, who had withdrawn it as there was nobody else present." What if someone else had stabbed him and, pulling it out, had vanished into the darkness before the complainant had recovered from his surprise and shock? It is to be remembered that the complainant had been earlier to a toddy-shop and might not have been as alert as usual.

H
I Then again, the positive statement of fact "Yes, I saw him inflict the injury here," was negatived and belied by the following answer to a question by the judge: "Because I saw the accused there and there was no one else. Yes, I assumed it was the accused who inflicted the injury on me."

When the above self-contradictions are considered — which, we regret to say, was not done

by the trial judge at all — there can no longer be that degree of satisfaction of guilt of an accused person which alone can justify a verdict of guilty.

There are certain other material facts too which could not be consistent with guilt. There admittedly was no animosity between the parties and the complainant himself could think of no reason why the appellant should have made the unprovoked attack on him. If there was no reason, on the one hand, for a false accusation, there was equally no reason, on the other, for the appellant to attack his inoffensive neighbour. The seriousness of the injury and the kind of weapon used should rather point to a vicious enemy and consequently, to a third party who had vanished as silently as he had appeared on the scene.

There was another error on the part of the judge in holding against the appellant certain alleged discrepancies in a police report said to have been made by the appellant of a breach of the peace in the vicinity of his house at the relevant time. The judge thought this to be merely a colourable attempt to draw a red herring across the trail. With respect, what had been overlooked was the fact that the report referred to was that of a Malay police constable, and *not* one made by the appellant, who could not be held responsible for hearsay, whether properly understood or not.

For the reasons above-stated, we allowed the appeal and quashed the conviction.

Appeal allowed.

Solicitors: *Cheang Lee & Ong.*

**TIEN CHU VE-TSIN CHEMICAL INDUSTRIES
(H.K.) LTD. v. MAUI-KONG VE-TSIN
MANUFACTURING (MALAYSIA)
CO. LTD.**

[O.C.J. (Raja Azlan Shah J.) October 3, 1966]

[K.L. — Civil Suit No. 759 of 1966]

Trade Marks — Infringement and passing-off — Action for — Damages and accounts of profits — Concurrent users — Stay of action.

In an action for infringement and passing-off claims for damages and accounts of profits are alternative remedies. It is a discretion of the court to grant one of the alternative remedies on the evidence adduced at the trial.

In an action for infringement and passing-off it is a discretion of the court to grant a stay of action taking into consideration all the circumstances of the case.

Cases cited in arguments:—

(1) *U. J. James & Sons Ltd. v. Wafer Razor Co. Ltd.* (1932), 49 R.P.C. 597.

(2) *Flowerdale Ltd. v. Hale Electric Co. Ltd.* (1949), 66 R.P.C. 333, C.A.

(3) *Agfa A.G. v. Ilford Ltd.* [1960] R.P.C. 108.
CIVIL SUIT.

The defendants in this action applied to the Registrar of Trade Marks, States of Malaya on May 5, 1965, for registration of three marks (applications No. M/43972, No. M/43973 and No. M/44693). On May 2, 1966 the plaintiffs filed notices of opposition to the applications. On June 29, 1966 the plaintiffs issued a generally indorsed writ of summons against the defendants for infringement of their two trade marks No. M/27967 and No. M/12091 and passing-off by reasons of user of the said three marks by the defendants in relation to their products, gourmet powder. The plaintiffs claimed, *inter alia*, for damages and accounts for profits. On July 13, 1966, the plaintiffs filed and served on the defendants their statement of claim. The defendants filed their defence on July 25, 1966. The plaintiffs applied for directions for an early trial and on July 25, 1966 the court gave the directions accordingly. The plaintiffs and defendants applied for particulars of the statement of claim and defence respectively and for leave to deliver interrogatories. On September 2, 1966 the court made orders for particulars accordingly and granted leave to deliver interrogatories. On September 7 and 25, 1966 the plaintiffs and the defendants respectively gave notices to admit facts to each other. The action came up for trial on October 3, 1966.

H. Elias for the defendants: The claims for damages and accounts are alternative remedies. Plaintiffs must elect as to which of the alternatives they want.

Before the action, the defendants applied to the Registrar of Trade Marks, States of Malaya for registration of three marks. The plaintiffs filed notices of opposition to the applicants. Proceedings before the registrar are pending. The defendants are applying for stay of action in respect of the claim for infringement of trade mark No. M/12091. (*U. J. James & Sons Ltd. v. Wafer Razor Co. Ltd.*⁽¹⁾; *Flowerdale Ltd. v. Hale Electric Co. Ltd.*⁽²⁾).

Cheng Tim Pin for the plaintiffs: The plaintiffs cannot be required to elect as to which of the alternative remedies they want before the trial. Which of the alternative remedies they are entitled to depends on the evidence to be adduced. It is a discretion of the court to award which of the alternative remedies on the evidence adduced at the trial. (*Halsbury's laws of England*, 3rd Edn., Vol. 38, pp. 642, note (d) and 647, note (p)). The defendants cannot apply for stay of action unless the applications before the Registrar of Trade Marks are made under section 33 of the Trade Marks Ordinance, 1950. See *Halsbury's laws of England*, 3rd Edn., Vol. 38, p. 638, para. 1048. *U. J. James & Sons Ltd. v. Wafer Razor Co. Ltd.*⁽¹⁾ is to be distinguished. The decision in *U. J. James & Sons Ltd. v. Wafer Razor Co. Ltd.* was not followed in all subsequent cases. The applications before the registrar are not made under section 33 of the Ordinance. The facts do not justify a claim for concurrent user. The defendants' user is dishonest. An application for stay of action must be made promptly. The defendants should have made the application immediately after the service of the statement of claim. The defendants took further proceedings and allowed further proceedings to be taken.